In The

Supreme Court of the United States

OCTOBER TERM, 1977
NO. 76-1816

ARTHUR F. TURCO, JR.,

Petitioner,

against

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD W. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Respondents.

BRIEF FOR RESPONDENTS THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, THE JUSTICES AND CLERK THEREOF IN OPPOSITION TO GRANTING CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents
The Capitol
Albany, New York 12224
Telephone (518) 474-8160

RUTH KESSLER TOCH
Solicitor General

WILLIAM J. KOGAN
Assistant Attorney General
of Counsel

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Statement

The Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, the Justices and Clerk thereof, submit this brief in opposition to the petitioner's application for certiorari to review the decision

of the United States Court of Appeals for the Second Circuit. The Court of Appeals decision affirmed the order of the District Court for the Western District of New York (BURKE, D.J.) dismissing the amended complaint. The United States Court of Appeals found that the doctrine of *res judicata* is applicable because the petitioner's "claims were actually raised [in the prior disbarment proceedings in the New York State Courts], and pursued right up to the Supreme Court."

The petitioner instituted this action seeking declaratory and injunctive relief under 42 U.S.C. § 1983 upon the grounds that certain of New York State's disbarment procedures denied him his constitutional rights of due process and equal protection of the law.

Questions Presented

Does the dismissal by the United States Court of Appeals on the grounds of *res judicata* of an action brought by an attorney ordered disbarred by New York State Courts present special and important reasons for the granting of certiorari where the questions raised by the plaintiff in the Federal action were actually raised by him both in the Appellate Division and in the Court of Appeals of the State of New York as well as in the Supreme Court of the United States on his application for certiorari in the State disciplinary proceeding?

Facts

In view of the narrow issue presented upon this application, an exhaustive review of the underlying facts will not be presented herein. A full discussion of the factual basis for the order of disbarment is contained in the opinion of the Appellate Division (46 A D 2d 490 [1975]) as well as in the opinion of the United States Court of Appeals for the Second Circuit (____F. 2d____, 4/21/77). In brief, the facts are as follows:

The petitioner, Arthur F. Turco, Jr., was disbarred by the New York State Appellate Division, Fourth Department, by an order dated January 28, 1975. The disciplinary proceedings against the petitioner had begun on or about April 4, 1972 when the Appellate Division directed

that an investigation of petitioner's conduct be conducted by the Monroe County Bar Association, the Bar Association of the County in which Turco practiced law. That investigation resulted in the filing of a petition in the Appellate Division which alledged that the petitioner "is or may be guilty of professional misconduct" in his office as an attorney. The petition alleged specifically that Mr. Turco had been indicted in Baltimore, Maryland on May 1, 1970 on charges of murder, conspiracy to commit murder, soliciting to commit a felony (murder), common law assault and soliciting to commit a felony (kidnapping). The petition further alleged that on February 14, 1972 Turco entered a plea of quilty* to the charge of common law assault (a misdemeanor), all other charges being dropped. The petition also alleged that Turco had been arrested in New York City on February 22, 1970 on charges of possession of dangerous weapons, possession of dangerous drugs, possession of hypodermic instruments and obstructing governmental administration. Turco pleaded quilty** to a violation of New York Penal Law § 265.06 (a misdemeanor) on March 8, 1972.

Mr. Turco's answer to the petition did not deny these allegations. Indeed, as the opinion of the United States Court of Appeals notes, Turco himself elaborated on the charges against him when he adverted during the course of the disciplinary proceedings to his "incognito stay in Canada" while he was free on bail pending his criminal proceedings and for which he was additionally charged with bail jumping. Both Turco and his counsel were heard by the Appellate Division after which that Court, in a memorandum-decision and order dated December 17, 1973, found that Turco was guilty of professional misconduct as an attorney.

The Appellate Division held that Turco was bound by his guilty pleas and that he did not have a right to relitigate the underlying facts. The Court did offer to him

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*The conviction on the plea of guilty was affirmed on appeal.

**The conviction on the plea of guilty was affirmed on appeal by the New York Appellate Term.

a "hearing in mitigation" to determine the discipline to be imposed. The purpose of the hearing was to enable Turco to offer testimony bearing upon his character and ability as an attorney. After receiving the hearing officer's report, which was submitted without recommendation, the Appellate Division ordered that Turco be disbarred (*Matter of Turco*, 46 A D 2d 490).

In the New York State Court of Appeals, Turco argued that as a result of the manner in which the disciplinary proceedings had been conducted he had been deprived of his right to due process and equal protection of the laws.

Turco's appeal to the New York Court of Appeals as of right was dismissed "upon the ground that no substantial constitutional question is directly involved." (36 N Y 2d 713 [Feb. 19, 1975].) Turco's motion for leave to appeal to the Court of Appeals was denied (36 N Y 2d 642 [Feb. 19, 1975]) as was certiorari to this Court (423 U.S. 838 [Oct. 6, 1975]). Turco commenced this action in the United States District Court for the Western District of New York on March 11, 1975 subsequent to the dismissal of his appeal to the Court of Appeals but prior to the denial of certiorari by this Court. He sought declaratory and injunctive relief against the disbarment order.

The United States District Court for the Western District of New York "temporarily" enjoined enforcement of the disbarment order*. On June 30, 1976, the Court (BURKE, D.J.) rendered a decision and order dismissing plaintiff's action stating:

> "There is not merit to the contention that he was denied equal protection of laws and due process by denial of a right of appeal to disbarred attorneys. Levis vs. Gulotta and related cases, Southern District of New York (three judge court judgment), affirmed by Supreme Court of the United States March 29, 1976.
>
> "This court should not interfere in state disciplinary proceedings, Erdmann vs. Stevens, 458 F. 2d. 1205 (2 Cir. 1972), cert. denied, 409 U.S. 889. Anony-

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*Petitioner has continued to practice law to the present by virtue of injuctive relief obtained from the several Courts to which the case has been brought.

mous vs. Association of the Bar of the City of New York, 515 F. 2d. 427 (2 Cir. 1975)."

The United States Court of Appeals for the Second Circuit held that the petitioner's constitutional claims of denial of equal protection of the laws and lack of due process are barred from consideration by the Federal district court under the doctrines of *res judicata* and collateral estoppel. With regard to petitioner's claim that *res judicata* should not apply to the constitutional arguments he had made in the New York State Courts because he was an involuntary respondent in the State disciplinary proceeding, the Second Circuit rejected petitioner's contention holding that such an argument:

> "*** has been foreclosed in this circuit by our decision in *Thistlewaite* v. *City of New York*, 497 F. 2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974), in which the very argument was made and rejected. There we applied collateral estoppel in a § 1983 case to a constitutional determination by a state court. And in *Tang* v. *Appellate Division*, 487 F. 2d 138, 141 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974), we barred relitigation of a denial of admission to the Bar because of lack of jurisdiction, *citing Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), and *res judicata* (Hays, J., concurring).
>
> "We do not deal here, therefore, with the slippery question involving Section 1983 actions where the state ligitation was involuntary as to the petitioner, and where the constitutional points could have been raised but were not. On such a state of facts, the Supreme Court still has to render a definitive ruling. Here the claims were actually raised, and pursued right up to the Supreme Court. In these circumstances, we are constrained to hold that the doctrine of *res judicata* is applicable, that petitioner may not have two bites at the cherry, and that the District Court properly dismissed the action."

ARGUMENT

POINT I

THE OPINION OF THE UNITED STATES COURT OF APPEALS PROPERLY HOLDS THAT THE INSTANT ACTION IS BARRED BY THE PRINCIPLES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL; THE OPINION IS IN CONFORMITY WITH THE OVERWHELMING MAJORITY OF RELEVANT AUTHORITY.

The petitioner's brief in this Court limits the issue presented on this application to the question of whether the principle of *res judicata* was properly invoked by the United States Court of Appeals in affirming the District Court order dismissing the amended complaint herein. The petitioner contends that the significance of the dismissal of this action on the basis of *res judicata* results from an alleged divergence of opinion amongst the Circuits as to the applicability of *res judicata* under the circumstances of this case as well as from the substantiality of the underlying due process questions sought to be presented to the Federal District Court.

The respondents suggest that the alleged inconsistencies in the decisional law on the *res judicata* question have been greatly exaggerated and in any event have no application herein. Further, as to the merits of this action, as will be argued briefly in Point II (*infra*), it is equally clear that the issues raised in the amended complaint have been addressed by the Courts on other occasions and, as discussed in the opinion below, have been resolved in each instance, in support of the respondents' position and contrary to the petitioner's.

Petitioner concedes, as he must, that principles of *res judicata* operate to bar relitigation in a Federal court of a claim which a party had a right to raise in a prior action brought either in the Federal or State courts but voluntarily chose the State court (citing *Parker* v. *McKeithen*, 488 F. 2D 553 [5th Cir., 1974], cert. den. 419 U.S. 838 [1974]). It is equally well settled that *res judicata* "has been held to be fully applicable to a civil rights action brought under § 1983." (*Preiser* v. *Rodriguez*, 411 U.S.

475, 497, 36 L. Ed. 2d 439, 93 S. Ct. 1924 [1973]); *cf. Huffman* v. *Pursue*, 420 U.S. 592, 606, fn. #18) Petitioner's attempted distinction of the instant case from previous authority, is, it is submitted, more apparent than real. As the Court below noted, this is not a case where the State litigation was involuntary as to the petitioner and where the constitutional points could have been raised but were not. "Here the claims were actually raised, and pursued right up to the Supreme Court" (Petitioner's Appendix, p. 13A). The decision of the Court below herein is supported by substantial authority throughout the circuits (*Lovely* v. *Laliberte*, 498 F. 2d 1261, 1263-64 [1st Cir., 1974], cert. den. 419 U.S. 1038; *Thistlewaite* v. *City of New York*, 497 F. 2d 339 [2d Cir., 1974], cert. den. 419 U.S. 1093, 42 L. Ed. 2d 686; *Roy* v. *Jones*, 484 F. 2d 96 [3d Cir., 1973]; *Coogan* v. *Cincinnati Bar Ass'n.*, 431 F. 2d 1209, 1211 [6th Cir., 1970]; *Blankner* v. *City of Chicago*, 504 F. 2d 1037, 1041-43 [7th Cir., 1974], cert. den. 421 U.S. 948, reh. den. 422 U.S. 1029; *Chasteen* v. *Trans World Airlines, Inc.*, 520 F. 2d 714 [8th Cir., 1975]; *Francisco Enterprises* v. *Kirby*, 482 F. 2d 481, 484-485 [9th Cir., 1973], cert. den. 415 U.S. 949; *Spence* v. *Latting*, 512 F. 2d 93, 97-99 [10th Cir., 1975], cert. den. 423 U.S. 1056).

Petitioner's reliance upon *Getty* v. *Reed*, 547 F. 2d 971 (6th Cir., 1977) is clearly misplaced as appears from the following statement in that opinion (at p. 974):

> "Without reference at this point to such questions as the substantiality of the claims or to such defenses as res judicata and collateral estoppel, we hold that the district Court had jurisdiction of the complaints."

The Court in *Getty* went on to distinguish its previous holdings in *Ginger* v. *Circuit Court for the County of Wayne*, 372 F. 2d 621 (6th Cir., 1967), cert. den. 387 U.S. 935 (1967) and *Coogan* v. *Cincinnati Bar Association*, 431 F. 2d 1209 (6th Cir., 1970) rather than to find a conflict therewith as suggested by the petitioner. Similarly, the support for petitioner's argument which he urges exists in *Kauffman* v. *Moss*, 420 F. 2d 1270 (3d Cir., 1970) cert. den.

400 U.S. 846 (1970); *Mulligan* v. *Schlacter*, 389 F. 2d 231 (6th Cir., 1968); and *Ney* v. *California*, 439 F. 2d 1285 (9th Cir., 1971) is nonexistent in that there was not a proper basis for the invocation of the doctrine of *res judicata* in the cited cases due to the absence of the issue in the prior proceedings in the State courts. While *Mack* v. *Florida State Board of Dentistry*, 430 F. 2d 862 (5th Cir., 1970), cert. den. 401 U.S. 960 (WHITE, J., dissenting from denial of writ) departs from the mainstream of pertinent precedent, cited above, it is significant that that decision predates, and consequently did not have the benefit of the current trend in this area of the law (see, *e.g.*, *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 [1975]; *Thistlewaite* v. *City of New York*, 497 F. 2d 339 [2d Cir., 1974], cert. den. 419 U.S. 1093 [1974]; *Tang* v. *Appellate Division*, 487 F. 2d 138 [2d Cir., 1973], cert. den. 416 U.S. 906 [1974]).

In summary, the petitioner asks this Court to grant certiorari in an action in which this Court has already examined the merits of his argument and denied certiorari in the New York State disciplinary proceedings (*Matter of Turco*, 46 A D 2d 490 [4th Dept.], app. dsmsd. 36 N Y 2d 713, cert. den. 423 U.S. 838 [1975]) and he bases his argument in this application upon alleged inconsistencies which close scrutiny reveals to be ephemeral.

POINT II

THE MERITS OF THE PETITIONER'S CONTENTIONS MADE AND REVIEWED FIVE TIMES IN THE NEW YORK STATE COURTS AND IN UNITED STATES COURTS DO NOT WARRANT FURTHER REVIEW BY THIS COURT.

The petitioner's arguments challenging the New York State disbarment procedures have not been made in the Appellate Division, Fourth Department, the New York State Court of Appeals, the United States Supreme Court, on application for certiorari, the United States District Court for the Western District of New York and the United States Court of Appeals for the Second Circuit. Petitioner thus seeks a sixth judicial review of

his disbarment and would have this Court consider his due process and equal protection arguments for the second time.

The respondents submit that the disbarment order, issued two and one-half years ago, has now been subjected to every judicial scrutiny to which a litigant can be entitled and that the time has come for the implementation of the lawful order of the Appellate Division.

The United States Court of Appeals for the Second Circuit thoroughly examined petitioner's due process and equal protection arguments in addition to its finding that the complaint should be dismissed on the grounds of *res judicata* and collateral estoppel. That Court distinguished petitioner's reliance upon *Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *Specht* v. *Patterson*, 386 U.S. 605 (1967); and *Humphrey* v. *Cady*, 405 U.S. 504 (1972), which petitioner urges this Court to consider in his argument that the secondary consequence of disbarment improperly flowed from his criminal convictions. In addition to the rationale of the Court of Appeals opinion, it should be noted that here we are dealing with a secondary consequence — petitioner's disbarment — which was conducted according to procedures which have previously and most recently been approved by this Court in its affirmance in *Mildner* v. *Gulotta*, 405 F. Supp. 182 (three-judge court, E.D.N.Y., 1975), affd. 96 S. Ct. 1489 (1976)*. The absence of a demonstration of merit to petitioner's constitutional arguments thus removes any warrant for review by this Court.

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*Respondents reply upon the principal enunciated in *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804, 43 L. Ed. 2d 636 (1975) that "a direct appeal will lie to this Court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below."

CONCLUSION

PETITIONER'S APPLICATION FOR CERTIORARI SHOULD BE DENIED.

Dated: July 12, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New york
Attorney for Respondents

RUTH KESSLER TOCH
Solicitor General

WILLIAM J. KOGAN
Assistant Attorney General
of Counsel